APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED APRIL 23, 2008

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term 2007

Argued: October 22, 2007 Decided: April 23, 2008

Docket No. 06-1983-cv

ROBERT MATICAN,

Plaintiff-Appellant,

- against -

CITY OF NEW YORK, JOHN SCHNEIDER, JULIO C. ORDONEZ, and CHRIS ZIMMERMAN,

Defendants-Appellees.

Before: FEINBERG, WINTER, and STRAUB, Circuit Judges.

FEINBERG, Circuit Judge:

Plaintiff-appellant Robert Matican participated in a sting to help officers of the New York Police Department ("NYPD") arrest a suspected drug dealer: Matican set up a drug buy, and the police descended on the dealer in force when he arrived about an hour later.

After the dealer was released on bail, he assaulted plaintiff Matican with a box cutter, injuring him severely. Matican sued the City of New York ("City") and individual NYPD officers—Captain Julio C. Ordonez, Lieutenant John Schneider, and Sergeant Chris Zimmerman (collectively, "the officers")—arguing that the way they conducted the sting and their failure to alert Matican to the dealer's release gave away Matican's identity and left him in peril. He asserted claims for damages under 42 U.S.C. § 1983 and New York state law. By memorandum and order dated March 28, 2006, the United States District Court for the Eastern District of New York (Block, J.) granted defendants-appellees' motion for summary judgment on the § 1983 claims and declined to exercise supplemental jurisdiction over the state-law claims. For the reasons stated below, we affirm the judgment of the district court.

I. BACKGROUND

For purposes of Matican's appeal from a grant of summary judgment, we take his allegations as true and draw all reasonable inferences in his favor. *Jenkins v. City of New York*, 478 F.3d 76, 85 n. 4 (2d Cir.2007).

On the evening of September 18, 2001, Matican purchased crack cocaine from a drug dealer he knew as "Mike," who had supplied him with drugs on a number of prior occasions. Undercover NYPD officers then arrested Matican and took him to a precinct house in Bayside, Queens. While Matican was in a holding cell,

defendant Zimmerman approached him and offered to make the arrest "go away" if Matican would agree to help the officers arrest Mike. Matican was interested in the offer but expressed concern for his safety if Mike made bail. Matican testified that Zimmerman responded, "Don't worry, Robert, we will look after you. We will protect you." Matican agreed to cooperate based on Zimmerman's promise.

According to Matican, Zimmerman then instructed Matican to arrange a drug buy with Mike the following evening in front of the Bayside Jewish Center, a frequent location for prior drug transactions between Matican and Mike. The police would be waiting with two cars and four officers in each car. When Mike executed his customary illegal U-turn in front of the Jewish Center, Matican would identify the car from the safety of a darkened athletic field across the street, and the police would pull over Mike as if for a routine traffic stop. Defendant Schneider asked Matican what quantity of drugs Mike would be carrying; when Matican replied that Mike would have 20 or 30 bags of crack, Schneider replied, "[I]f he has that many bags, he is not going to even make bail." After the plan was formulated, the officers released Matican with a desk appearance ticket.

The following evening, Matican met the officers at the prearranged location and paged Mike to arrange a large drug buy. Mike arrived and Matican identified his car, as planned. According to Matican, the officers then cut Mike off with two police vehicles, pulled him from the driver's seat, and pinned him against his car. The

officers searched Mike's person and car, discovered drugs, and arrested him. Matican remained hidden and unseen in the darkened field.

Mike, whose real name was Steven Delvalle, was found to be in possession of 16 bags of crack cocaine, two bags of marijuana, and about $2,000 in cash. Delvalle was charged with two counts of criminal possession of a controlled substance, as well as various moving violations. A criminal check performed at the precinct revealed that Delvalle had six prior arrests, including arrests for possession of a handgun and assault with a box cutter. On September 28, 2001, Delvalle was released on bail. Matican was not informed of Delvalle's arrest history, his release, or his real name, and he alleges that had he known these facts, he would have moved to California to live with his brother.

Matican never contacted Delvalle again after the sting operation. He acknowledges that he discussed his participation in the sting with his parents and a close friend, and that at least one other person knew about his role. On December 8, 2001, Delvalle approached Matican on a street in Queens. Delvalle said, "You ratted me. Why did you rat me?" He slashed Matican's face twice with a box cutter, then fled. Delvalle was arrested several days later; he eventually pled guilty to one count of attempted assault and one count of attempted criminal possession of a controlled substance, and was sentenced to eight years in prison.

Appendix A

Matican filed his suit in the Eastern District in November 2002, stating causes of action under 42 U.S.C. § 1983 and New York common law. Defendants moved for summary judgment on all claims. The district court granted summary judgment on the § 1983 claims and declined to exercise supplemental jurisdiction over the state claims. *Matican v. City of New York*, 424 F.Supp.2d 497 (E.D.N.Y.2006). This appeal followed.

II. DISCUSSION

We review de novo the district court's grant of summary judgment, construing the evidence in the light most favorable to Matican, the nonmoving party, and drawing all inferences and resolving all ambiguities in his favor. *Doro v. Sheet Metal Workers' Int'l Ass'n*, 498 F.3d 152, 155 (2d Cir.2007). Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

Matican asserted the following causes of action: (1) a claim under 42 U.S.C. § 1983 that the officers violated his right to substantive due process under the Fourteenth Amendment by failing to protect him from Delvalle's assault; (2) a § 1983 claim against the City for failing to train its officers to protect confidential informants from harm; and (3) claims sounding in state law against all defendants asserting that the officers behaved negligently, and that the City is vicariously

liable for their actions under the doctrine of respondeat superior.

The first two claims depend on a single threshold question: did the officers' actions violate Matican's constitutional rights? If they did not, then the City cannot be liable to Matican under § 1983, regardless of whether the officers acted pursuant to a municipal policy or custom. *City of Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986) (per curiam). Furthermore, if Matican has no valid claim under § 1983 against any defendant, it is within the district court's discretion to decline to exercise supplemental jurisdiction over the pendent state-law claims. *See Kolari v. New York-Presbyterian Hosp.*, 455 F.3d 118, 122 (2d Cir.2006) (citing 28 U.S.C. § 1367(c)(3)).[1] We therefore begin with the threshold question of whether the officers' conduct infringed Matican's constitutional rights.

Among the liberties protected by the Due Process Clause of the Fourteenth Amendment is "a right to be free from . . . unjustified intrusions on personal security." *Ingraham v. Wright*, 430 U.S. 651, 673, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977). But in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), the Supreme

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1. We must also determine the existence of a constitutional violation before we may consider the officers' defense of qualified immunity. *Sira v. Morton*, 380 F.3d 57, 68-69 (2d Cir. 2004) (citing *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)).

Court observed that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." *Id.* at 195, 109 S.Ct. 998. As a result, the Court held that the Clause "generally confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *Id.* at 196, 109 S.Ct. 998.

We have recognized two exceptions to this general principle, rooted in the Supreme Court's analysis in *DeShaney.* First, the state or its agents may owe a constitutional obligation to the victim of private violence if the state had a "special relationship" with the victim. *See Ying Jing Gan v. City of New York*, 996 F.2d 522, 533 (2d Cir.1993) (citing *DeShaney*, 489 U.S. at 198, 109 S.Ct. 998). Second, the state may owe such an obligation if its agents "in some way had assisted in creating or increasing the danger to the victim." *Dwares v. City of New York*, 985 F.2d 94, 98-99 (2d Cir.1993) (citing *DeShaney*, 489 U.S. at 201, 203, 109 S.Ct. 998), *overruled on other grounds by Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993).

Even if Matican's claim falls within one of these two exceptions, and the officers' behavior violated a constitutional obligation, Matican faces a further hurdle: he must show that the officers' behavior was "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *County of*

Sacramento v. Lewis, 523 U.S. 833, 848 n. 8, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). This requirement screens out all but the most significant constitutional violations, "lest the Constitution be demoted to . . . a font of tort law." *Id.*; *see Paul v. Davis*, 424 U.S. 693, 701, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976).

We consider (1) whether Matican's claims fall within either of the two *DeShaney* exceptions and (2) whether the officers' behavior can be said to shock the contemporary conscience.

A. Special relationship exception.

The special relationship exception grows from the *DeShaney* Court's observation that "in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals." *DeShaney*, 489 U.S. at 198, 109 S.Ct. 998.[2] The Court gave, as examples, the obligations of states to incarcerated prisoners and involuntarily committed mental patients, and concluded that "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being."

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2. We recognized this principle before *DeShaney*, in *Doe v. New York City Department of Social Services*, 649 F.2d 134, 141 (2d Cir.1981).

Id. at 199-200, 109 S.Ct. 998.[3] Under these limited circumstances, the state may owe the incarcerated person an affirmative duty to protect against harms to his liberties inflicted by third parties. But the duty arises solely from "the State's affirmative act of restraining the individual's freedom to act on his own behalf [ ] through incarceration, institutionalization, or other similar restraint of personal liberty." *Id.* at 200, 109 S.Ct. 998.

Our own opinions have also focused on involuntary custody as the linchpin of any special relationship exception. *See Lombardi v. Whitman*, 485 F.3d 73, 79 n. 3 (2d Cir.2007) ("Special relationships arise ordinarily if a government actor has assumed an obligation to protect an individual by restricting the individual's freedom in some manner, as by imprisonment."); *Suffolk Parents of Handicapped Adults v. Wingate*, 101 F.3d 818, 824 (2d Cir.1996) (holding that plaintiffs' claim did not fall within *DeShaney* exception because "the plaintiffs here . . . are not involuntarily institutionalized"); *see also Doe v. N.Y.C. Dep't of Soc. Servs.*, 649 F.2d 134, 141 (2d Cir.1981) (holding that state is liable under Due Process Clause for abuse suffered by child in foster care, and emphasizing custodial nature of foster care placement).

The relationship between defendants and Matican does not resemble those that have been found to lie within the bounds of the special relationship exception. Matican

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3. The Court noted that the situation of a child placed in foster care might be sufficiently analogous to those of prisoners or mental patients to trigger the exception, but it did not decide the question. *Id.* at 201 n. 9, 109 S.Ct. 998.

freely agreed to serve as a confidential informant in exchange for more lenient treatment. He was not in custody at the time of the sting or of Delvalle's assault. The state did not "render[ ] him unable to care for himself," *DeShaney*, 489 U.S. at 200, 109 S.Ct. 998; after all, Matican argues that, had defendants warned him of Delvalle's release, he would have moved to California to live with his brother. That he was in custody when he agreed to become a confidential informant is of no moment: he does not allege that he was coerced, and his former incarceration did not exacerbate his injury. *See id.* at 201, 109 S.Ct. 998 ("That the State once took temporary custody of [petitioner] does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter.").

We therefore join several of our sister circuits in holding that a noncustodial relationship between a confidential informant and police, absent more, is not a special relationship. *Accord Velez-Diaz v. Vega-Irizarry*, 421 F.3d 71, 80 (1st Cir.2005); *Dykema v. Skoumal*, 261 F.3d 701, 706 (7th Cir.2001); *Butera v. District of Columbia*, 235 F.3d 637, 648 (D.C.Cir.2001); *Summar v. Bennett*, 157 F.3d 1054, 1059 (6th Cir.1998).[4]

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4. Matican encourages us to adopt the reasoning of *G-69 v. Degnan*, 745 F.Supp. 254 (D.N.J.1990), which held that a special relationship exists between the state and a confidential informant whose safety depends on confidentiality. *Id.* at 265. But *G-69* fails to distinguish between the special relationship

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Appendix A

B. State-created danger exception.

Like the special relationship exception, the state-created danger exception arises from the Court's analysis in *DeShaney.*[5] After explaining that no special relationship existed between the state and petitioner, the Court further noted that, "[w]hile the State may have been aware of the dangers that [petitioner] faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." *DeShaney*, 489 U.S. at 201, 109 S.Ct. 998. The Court emphasized that government officers had done nothing worse than failing to take action even though suspicious circumstances may have counseled an active role. *Id.* at 203, 109 S.Ct. 998. These statements led us to conclude that, by negative implication, the state does infringe a victim's due process rights when its officers assist in creating or increasing the danger that the victim faced at the hands of a third party. *Dwares*, 985 F.2d at 99.

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and state-created danger exceptions, a distinction that may not have been obvious in *DeShaney*'s immediate aftermath. *See id.* (finding special relationship because plaintiff's service to state "increased by a corresponding proportion the risk to his life"). As such, we do not find the decision to be particularly persuasive, and choose instead to follow the more recent analysis from our sister circuits.

5. The doctrine had been recognized in some circuits prior to *DeShaney. See Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 n. 1 (9th Cir.2006) (collecting cases).

In applying the state-created danger principle, "we have sought to tread a fine line between conduct that is 'passive' " (and therefore outside the exception) "and that which is 'affirmative' " (and therefore covered by the exception). *Pena v. DePrisco*, 432 F.3d 98, 109 (2d Cir.2005). Thus, we have found state-created dangers (or denied summary judgment where state-created danger theories were alleged) where police officers told skinheads that they would not prevent them from beating up protesters in a park, *Dwares*, 985 F.2d at 99; where police officers gave a handgun to a retired officer who then shot a fleeing robber, *Hemphill v. Schott*, 141 F.3d 412, 419 (2d Cir.1998); where a prison guard told inmates that it was "open season" on a prisoner, and the inmates beat up the prisoner, *Snider v. Dylag*, 188 F.3d 51, 55 (2d Cir.1999); and where police officials encouraged an off-duty colleague to drink excessively, after which he killed three pedestrians in a car accident, *Pena*, 432 F.3d at 110-11. By contrast, we held that no state-created danger existed where a police officer failed to intervene to prevent a colleague from shooting someone during an altercation. *Pitchell v. Callan*, 13 F.3d 545, 549 (2d Cir.1994).[6]

As the district court recognized, Matican's allegation that the officers failed to learn about, or inform him of, Delvalle's violent criminal history or his release on bail

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6. We declined to decide whether a state-created danger existed where, after the terrorist attacks of September 11, 2001, federal officials informed rescue workers that the air near the World Trade Center site was safe to breathe, causing the workers to forego protective gear. *Lombardi*, 485 F.3d at 81.

fall on the passive side of the line. "Under *DeShaney*, allegations that the defendant officers merely stood by and did nothing are insufficient to state a constitutional violation." *Pena*, 432 F.3d at 110 (internal quotation marks omitted); *see also Lombardi*, 485 F.3d at 79 ("It is not enough to allege that a government actor failed to protect an individual from a known danger of bodily harm or failed to warn the individual of that danger."). This is so notwithstanding Matican's assertion that the officers promised to protect him. *See DeShaney*, 489 U.S. at 200, 109 S.Ct. 998 ("The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him. . . .").

By contrast, Matican's allegation that the officers planned the sting in a manner that would lead Delvalle to learn about Matican's involvement is sufficiently affirmative to qualify as a state-created danger. *See Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1063 (9th Cir.2006) (finding that, where police officer informed assailant that victim had filed report against him, and assailant then shot victim, officer "affirmatively created an actual, particularized danger" to victim).[7]

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7. The defendant law enforcement officers in *Dwares*, *Hemphill*, *Snider*, and *Pena* all had personal relationships with the third-party assailants, and they either actively facilitated the assaults or personally communicated that assaults would go unpunished. Here, by contrast, the officers' conduct might have indirectly alerted Delvalle to Matican's identity, but the officers had no personal relationship with Delvalle other than

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C. Shocking the conscience.

Until recently, Supreme Court and Second Circuit precedent gave little objective guidance as to whether a particular state action does or does not shock the contemporary conscience. In *Lewis*, the Supreme Court noted one set of parameters: negligently inflicted harm "is categorically beneath the threshold of constitutional due process," 523 U.S. at 849, 118 S.Ct. 1708 (citing *Daniels v. Williams*, 474 U.S. 327, 328, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986)), whereas the intentional infliction of injury is the conduct "most likely to rise to the conscience-shocking level," *id.* As for conduct between these poles, the Court held only that harm inflicted

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the arrest itself. We have thus far found state-created dangers only where there is such a relationship. *See Pena*, 432 F.3d at 109 ("Our distinction between these categories of cases suggests that 'special relationship' liability arises from the relationship between the state and a particular victim, whereas 'state created danger' liability arises from the relationship between the state and the private assailant."); *see also Dwares*, 985 F.2d at 99 (describing officers' liability in terms of "aid[ing] and abett[ing]"). However, other circuits have found state-created dangers where state officials had no relationship with the individual causing harm, *e.g.*, *Wood v. Ostrander*, 879 F.2d 583, 590 (9th Cir.1989), or where the victim was not harmed by an individual at all, *e.g.*, *Kneipp ex rel. Cusack v. Tedder*, 95 F.3d 1199, 1209 (3d Cir.1996). Because the officers' affirmative conduct did not shock the conscience (as explained below), we need not decide whether the state-created danger exception is limited to cases where state officials had a direct relationship with the third party who caused injury.

recklessly or with deliberate indifference does not shock the conscience in the context of a time-sensitive emergency, such as a high-speed chase. *Id.* at 853-54, 118 S.Ct. 1708. Here, though, the officers had ample opportunity to plan the sting in advance. Matican argues that the district court erred in holding that the officers did not act with deliberate indifference. He proposes a balancing test to help factfinders determine when the conscience is shocked by reckless or deliberately indifferent state action that creates or increases a danger.

We need not consider Matican's proposed test, because this court's decision last year in *Lombardi* provides sufficient guidance to resolve this issue. In that case, we considered the claims of rescue and cleanup workers at the World Trade Center site following the 9/11 attacks. The workers in that case alleged that the defendants, federal environmental and workplace-safety officials, issued intentionally false press releases stating that the air in Lower Manhattan was safe to breathe, and that in reliance on those statements, the workers did not use protective gear. *Lombardi*, 485 F.3d at 75. We held that, regardless of whether the situation was a time-sensitive emergency, plaintiffs' allegations of deliberate indifference did not shock the conscience. *Id.* at 85. "Hurried or unhurried, the defendants were subjected to the 'pull of competing obligations.' " *Id.* at 83 (quoting *Lewis*, 523 U.S. at 834, 118 S.Ct. 1708). reasoned that those competing obligations counseled against broad constitutional liability for the government officials, whose decisionmaking might be inhibited by

the threat of lawsuits. *Id.* at 84. We concluded that "[w]hen great harm is likely to befall someone no matter what a government official does, the allocation of risk may be a burden on the conscience of the one who must make such decisions, but does not shock the contemporary conscience." *Id.* at 85.

The same considerations lead us to conclude that Matican's allegations of affirmative conduct by the officers, even if true, do not shock the contemporary conscience. In designing the sting, the officers here had two serious competing obligations: Matican's safety and their own. They could reasonably have concluded that the arrest of a potentially violent drug dealer demanded the use of overwhelming force, even if that show of force might jeopardize the informant's identity in the future. We are loath to dictate to the police how best to protect themselves and the public, especially when our ruling could be taken to require officers to use riskier methods than their professional judgment demands.

As we explained in *Lombardi*, the defendants in our prior state-created danger cases were not subject to "the pull of competing obligations." *See id.* at 83 (discussing *Pena* and *Dwares*). *Butera v. District of Columbia*, 235 F.3d 637 (D.C.Cir.2001), which Matican cites, is distinguishable for the same reason: the officers in that case sent an informant into an undercover drug buy while monitoring from the safety of their cars, *id.* at 642, and thus would have incurred no risk had they fitted the informant with wires or agreed in advance on danger signals, *id.* at 644.

Because the officers were obliged to protect their own safety as well as Matican's, their design of the sting in this case does not shock the conscience.[8] Matican therefore suffered no violation of his rights under the Due Process Clause.

III. CONCLUSION

We find that no constitutional violation occurred. We see no need to consider whether the officers enjoyed the benefit of qualified immunity, or whether Matican had a claim against the City for a practice or custom of failing to protect confidential informants. Furthermore, because Matican has no valid federal claims, the district court did not exceed its allowable discretion in declining to exercise jurisdiction over his state claims. 28 U.S.C. § 1367(c). We have considered all of Matican's other arguments for reversal of summary judgment and find them to be without merit.

Judgment affirmed.

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8. We need not resolve the vexing questions raised by defendants about the proximate cause of Matican's injuries.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED MARCH 28, 2006

UNITED STATES DISTRICT COURT
E.D. NEW YORK

No. 02-CV-5805 (FB) (KAM).

ROBERT MATICAN,

Plaintiff,

v.

CITY OF NEW YORK, JOHN SCHNEIDER, JULIO C. ORDONEZ, and CHRIS ZIMMERMAN,

Defendants.

March 28, 2006.

MEMORANDUM AND ORDER

BLOCK, Senior District Judge.

Robert Matican ("Matican") sues the City of New York ("City") and three members of the New York City Police Department ("NYPD"): Captain Julio C. Ordonez ("Ordonez"), Lieutenant John Schneider ("Schneider") and Sergeant Chris Zimmerman ("Zimmerman") (collectively, "the officers"). Asserting claims under

42 U.S.C. § 1983 and New York common law, he seeks to hold defendants liable for damages suffered when he was assaulted by a private citizen.

Pursuant to Federal Rule of Civil Procedure 56, all defendants move for summary judgment on all claims; in addition, Matican cross-moves for summary judgment on his state-law claim. For the following reasons, the Court grants defendants' motion as to the § 1983 claims and declines to exercise jurisdiction over the state-law claim.

BACKGROUND

"When considering a motion for summary judgment, a court must construe the evidence in the light most favorable to the nonmoving party, drawing all inferences in that party's favor." *Jeffreys v. City of New York*, 426 F.3d 549, 553 (2d Cir.2005). The following facts are either undisputed or, if disputed, taken in the light most favorable to Matican:

> On September 18, 2001, Matican was arrested for possession of crack cocaine; he claims that while he was awaiting processing in a holding cell, Zimmerman approached him and said, "Robert, we can help you with this. We can make this arrest go away." Matican Dep. at 92. When Matican asked what he had to do, Zimmerman told him he wanted to set up Matican's dealer (whom Matican knew only as "Mike"). Matican then asked, "If I help you

> and he [i.e., "Mike"] makes bail and he comes after me, will you protect me?" and Zimmerman responded, "Don't worry, Robert, we will look after you. We will protect you." *Id.* at 93. The defendants contest this version of events and claim that Matican volunteered to help Zimmerman and other officers apprehend "Mike" in exchange for favorable treatment from the district attorney's office.

Although the parties dispute who came up with the plan to apprehend "Mike" and when it was formulated, they do not question the plan's existence. Matican claims that one of the officers—perhaps Schneider—suggested arresting both "Mike" and Matican after a face-to-face sale. Matican admits he did not voice any objection to that plan, but attests that "[a]nother cop said, 'Hey, why don't we just let [Matican] point ["Mike"] out and keep him out of it,' " *id.;* Matican "liked that plan better." *Id.* The officers therefore decided that Matican would be kept out of sight during the operation.

Matican told the officers that he usually bought drugs from "Mike" near the Bayside Jewish Center at 204th Street and 32nd Avenue in Queens, and that "Mike" normally made an illegal u-turn arriving at that location. Based on this information, Matican and the officers agreed that Matican would page "Mike," arrange a buy, and hide at a nearby athletic field with Schneider. Matican would then identify "Mike" when he arrived, whereupon Schneider would radio other officers,

including Ordonez, who would stop "Mike" and use the illegal u-turn as a pretext for searching his car.

While discussing the plan, Zimmerman asked Matican, "[H]ow much drugs do you think ['Mike'] will have on him?" Matican Dep. at 109. When Matican said that he believed "Mike" would have "[t]wenty, thirty bags of crack," Zimmerman replied, "If he has that much drugs on him, he is not going to make bail." *Id.*

The officers opened a confidential-informant ("CI") file for Matican; the contents of the file are unknown, as defendants have been unable to locate it.[1] Defendants do not dispute, however, that Matican was given CI status. He was given a desk-appearance ticket and released early on the morning of September 19, 2001.

Later that day, Matican called Zimmerman three times to see if the sting operation was still on. Zimmerman confirmed that it was and, with Schneider and Ordonez, put the prearranged plan in motion.

Matican paged "Mike" and arranged a buy; the meeting was scheduled for the same day—September 19—at 8:00 p.m. and at the usual location. Matican and Schnieder then hid at the nearby athletic field, which was unlit. "Mike" did not arrive until almost an hour after Matican paged him. Schneider claims that, during

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1. Matican seeks an inference in his favor because of the lost file. He does not specify, however, what information allegedly in the file would support his claims.

this interval, he (Schneider) suggested discontinuing the operation, but that Matican wished to proceed; Matican denies this.

"Mike" finally arrived and made his usual illegal u-turn, at which time Matican identified him; Schneider than radioed the other officers. Ordonez and at least four other police officers converged on "Mike's" car in at least three cars; some of the officers were in street clothes and some of the cars were unmarked. According to Edward Mamet ("Mamet"), a retired NYPD officer and "police practices" expert, the "number of officers and police vehicles used was not in accordance with what would be generally used to conduct a traffic stop." Mamet Decl. ¶ 8.[2]

During the subsequent search, "Mike" was found to be in possession of marijuana; he was arrested and taken to the precinct for processing. At the precinct, "Mike," by this time identified as Steven Delvalle ("Delvalle"), was also found to be in possession of crack cocaine. An inventory of his possessions prepared by Officer Kevin Shanahan (who is not a defendant in this case) recites that, in addition to "2 ziplocks of Marijuana," Delvalle was "in possession of 16 ziplocks of crack/cocaine and was attempting to sell them." Decl. of Michael A. Haskel, Ex. V.

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2. The defendants argue that Mamet's declaration should be disregarded because he was not disclosed as an expert under Federal Rule of Procedure 26(a)(2). It is not necessary to address this issue as the defendants are entitled to summary judgment whether or not the affidavit is considered.

Appendix B

A criminal check at the precinct revealed that Delvalle had several prior arrests, including one for criminal possession of a firearm and another for assault with a box cutter. The officers did not follow up on the disposition of the arrests; had they done so, they would have found that both had resulted in convictions on guilty pleas.

In connection with the sting operation, Delvalle was charged with third- and fourth-degree possession of a controlled substance, making an illegal u-turn, and driving without a license; despite Schneider's prediction, he was released on bail on September 28, 2001. The officers did not know that Delvalle had been released and, as a result, did not contact Matican to inform him. Had he known of Delvalle's release and violent history, Matican claims that he would have moved to California to live with his brother.

Matican had no contact with the officers or Delvalle from September 19 to December 8, 2001. On that date, Delvalle attacked Matican and slashed him across the face with a box cutter; Matican claims that during the assault Delvalle said, "You ratted me. . . . Why did you rat me?" Matican Dep. at 173. Delvalle was arrested and charged with first- and second-degree assault; he later pleaded guilty to attempted first-degree assault and was sentenced to eight years' imprisonment and five years' supervised release. In connection with the sting operation, Delvalle pleaded guilty to attempted possession of a controlled substance in the third degree and was sentenced to three to six years' imprisonment,

to be served concurrently with his sentence for the assault on Matican.

All New York City police officers receive a copy of the Patrol Guide, a comprehensive manual that guides officers in the performance of their duties. The officers involved in apprehending Delvalle relied on Procedure No. 212-68 of the Patrol Guide, which sets forth procedures for dealing with CIs and, in particular, for keeping their identities confidential; it does not, however, provide specific guidance for protecting the safety of CIs. Apart from Procedure No. 212-68, the City provides additional written guidance for the use of CIs in narcotics operations, but the officers do not recall relying on such guidance; in any event, while the additional written materials broadly caution officers to consider a CI's safety, they do not specify what steps should be taken to achieve that objective. The officers do not recall receiving any other training on how to protect the identity or safety of CIs participating in sting operations.

Referring to a newspaper article, Matican claims that at least nineteen witnesses were killed in New York City between 1980 and 2003. As Matican was not asked or required to testify as a witness, the relevance of this statistic is unclear. The City does not compile statistics on how many CIs are killed or injured in retaliation for their services.

Appendix B

DISCUSSION

Summary judgment is warranted when the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as matter of law." Fed.R.Civ.P. 56(c). Although, as noted, the Court must view all evidence in the light most favorable to the non-moving party, that party must still come forward with specific facts showing that there is a genuine issue for trial. *See, e.g., Shannon v. New York City Transit Auth.*, 332 F.3d 95 (2d Cir.2003).

Matican asserts three claims:

> (A) a claim under § 1983 that by failing to protect him from the assault by Delvalle, the officers violated his substantive due-process rights under the Fourteenth Amendment;
>
> (B) a claim under § 1983 that by failing to adequately train its police officers to prevent such constitutional violations, the City is liable under *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); and
>
> (C) a claim under state law that the officers' failure to protect him amounted to negligence, and that the City is vicariously liable for that negligence under the doctrine of *respondeat superior.*

The Court will consider each in turn.

Appendix B

A. § 1983 Claim Against the Officers

With regard to Matican's § 1983 claim against the officers, they argue (1) that Matican has failed to establish a constitutional violation, and (2) that, even if he had, they would be entitled to qualified immunity. *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), requires the Court to address these issues in sequence; that is, the Court must "ask first whether the facts, viewed in the light most favorable to the plaintiff, establish a constitutional violation. . . . If they do not, the plaintiff may not recover because he has suffered no wrong cognizable under § 1983." *Sira v. Morton*, 380 F.3d 57, 68-69 (2d Cir.2004) (citing *Saucier*, 533 U.S. at 201, 121 S.Ct. 2151). "If the facts do establish a constitutional violation, however, [the Court] proceed[s] to a second inquiry, asking 'whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.' . . . If a reasonable officer could have believed that the challenged conduct was lawful at the time of the violation, then qualified immunity bars the claim." *Id.* (quoting *Saucier*, 533 U.S. at 202, 121 S.Ct. 2151).[3]

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3. The Second Circuit has held that *Saucier's* sequential approach is not required in certain limited circumstances, such as "when the existence of a constitutional violation depends on the resolution of uncertain state law," *Ehrlich v. Town of Glastonbury*, 348 F.3d 48, 58 (2d Cir.2003), or where "any unsettled constitutional issues raised" will likely be settled outside the context of § 1983 actions. *Koch v. Town of Brattleboro*, 287 F.3d 162, 166 (2d Cir.2002) (noting that unsettled issues of Fourth Amendment law will often be resolved by rulings on motions to suppress in criminal cases). Those circumstances are not present here.

Appendix B

1. Constitutional Violation

Matican claims that the officers' failure to prevent Delvalle's attack violated his right to substantive due process. Whether the Due Process Clause triggers a duty on the part of governmental actors to provide protection against an attack by private actors in a given factual setting is a question of law appropriate for resolution on summary judgment. *See Ying Jing Gan v. City of New York*, 996 F.2d 522, 534 (2d Cir.1993).

In *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), the Supreme Court held that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors," *id.* at 195, 109 S.Ct. 998; thus, "[a]s a general matter, a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 197, 109 S.Ct. 998.

Relying on *dicta* in *DeShaney*, the Second Circuit has recognized two exceptions to this general rule: First, in *Ying Jing Gan*, the court observed that a governmental actor may have a constitutional obligation to protect an individual from private violence "because of a special relationship with [the] individual." 996 F.2d at 533. Second, in *Dwares v. City of New York*, 985 F.2d 94 (2d Cir.1993), the court held that the Due Process Clause is implicated if the governmental actor "assisted in creating or increasing the danger to the victim [of

private violence]." *Id.* at 99. The court recently summarized the state of the law surrounding these two exceptions in *Pena v. DePrisco*, 432 F.3d 98 (2d Cir.2005).

As *Pena* makes clear, the existence of a special relationship or state-created danger is but the first step in the analysis: "[T]o establish a violation of a right to substantive due process, a plaintiff must demonstrate not only government action but also that the government action was 'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.' " *Id.* at 112 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n. 8, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998)). This restriction exists to prevent the Due Process Clause from becoming a "font of tort law." *Lewis*, 523 U.S. at 848, 118 S.Ct. 1708. Thus, "negligently inflicted harm is categorically beneath the threshold of constitutional due process," *Lewis*, 523 U.S. at 849, 118 S.Ct. 1708; however, "[i]n situations where actors have an opportunity to reflect and make reasoned and rational decisions, deliberately indifferent behavior may suffice to 'shock the conscience.' " *Rivera v. Rhode Island*, 402 F.3d 27, 36 (1st Cir.2005), *quoted with approval in Pena*, 432 F.3d at 113.

a. Special Relationship

Matican argues that his CI status constitutes a special relationship. Neither the Supreme Court nor the Second Circuit has addressed the issue of whether CI status is the type of special relationship that will support a substantive due-process claim. Both courts,

however, have recognized that a constitutionally significant special relationship generally involves some type of custody or other restraint on individuals' ability to fend for themselves. *See DeShaney*, 489 U.S. at 200, 109 S.Ct. 998 ("The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf."); *Ying Jing Gan*, 996 F.2d at 533 ("Special relationships that have been recognized to give rise to a governmental duty to protect against third-person attacks have included custodial relationships such as a prison and inmate or a mental institution and involuntarily committed patient, and the relationship between a social service agency and foster child.").

District courts in this circuit have deduced from *DeShaney* and *Ying Jing Gan* that there can be no special relationship when such involuntary restraints are not present. *See Clarke v. Sweeney*, 312 F.Supp.2d. 277, 296 (D.Conn.2004) (no special relationship between state and subpoenaed witness); *Smith v. Town of East Haven*, 2005 WL 677284 (D.Conn. Mar.22, 2005) (no special relationship where defendant did not limit plaintiff's freedom of movement or ability to act on her own behalf). For the same reason, other circuit courts have held that there is no special relationship where the plaintiff "voluntarily agreed to serve as a confidential informant." *Summar v. Bennett*, 157 F.3d 1054, 1059 (6th Cir.1998); *see also Dykema v. Skoumal*, 261 F.3d 701, 704 (7th Cir.2001) (holding that informant did not fall

within special-relationship exception or any other exception to *DeShaney*). Although one district court has held that a special relationship existed between a CI and the police, who had stopped providing protection despite an agreement to do so, *see G-69 v. Degnan*, 745 F.Supp. 254, 265 (D.N.J.1990), that decision has not been followed. *See Summar*, 157 F.3d at 1059 (referring to *G-69* as a "renegade decision").

Here, there is nothing to suggest that Matican was not free to decline becoming a CI; therefore, he does not fit within the special relationship exception to *DeShaney*.

b. State-Created Danger

Matican contends that the state-created danger exception applies because the officers increased the likelihood that he would be attacked by handling the sting operation in such a way that Delvalle knew (or at least surmised) that Matican was responsible for his arrest, and by then failing to follow up on—and inform Matican of—Delvalle's violent nature and release from jail. As the Second Circuit recognized in *Pena*, "the term 'state-created danger' can refer to a wide range of disparate fact patterns," 432 F.3d at 108; the issue is whether the particular fact pattern presented here—namely, the execution of the sting operation in a way that compromised Matican's identity—amounts to a state-created danger.

Appendix B

In *Pena*, the Second Circuit noted in *dicta* that "[o]ur distinction between [the two exceptions to *DeShaney*] suggests that 'special relationship' liability arises from the relationship between the state and a particular victim, whereas 'state created danger' liability arises from the relationship between the state and the private assailant," 432 F.3d at 109; here, there is no evidence of a relationship between the officers and Delvalle. The Court, however, takes this aspect of *Pena* simply as a passing recognition that many of the circuit's prior state-created danger cases involved a connection between the governmental actor and the private assailant. The Court does not read *Pena* as establishing such a relationship as a *sine qua non* of state-created danger liability; governmental actors may put an individual in harm's way even in the absence of a connection to a private assailant, and the present case is an example. *See also Kneipp v. Tedder*, 95 F.3d 1199, 1208-09 (3d Cir.1996) (holding that police officer created danger by directing husband to drive home while leaving visibly intoxicated wife to walk home unescorted in cold weather). Thus, that there is no evidence of a relationship between the defendants and Delvalle is of no consequence.

Another aspect of *Pena* provides more significant guidance. *Pena* reiterates that the state-created danger exception applies only when the governmental actor's conduct can be fairly characterized as "affirmative," as opposed to "passive." *Id.* at 109 ("In applying our 'state created danger' principle, we have sought to tread a fine line between conduct that is 'passive' as in

DeShaney and that which is 'affirmative' as in *Dwares.*"). Thus, the court held in *Pena* that encouraging excessive drinking of alcohol on and off duty was sufficiently "affirmative" to trigger the exception, but was careful to point out that simply failing to intercede or punish misconduct would not have been. *See* 432 F.3d at 110-11.

The circuit's other state-created danger cases bear out the active-passive dichotomy. In *Dwares*, for example, the court held that the exception applied because the plaintiff alleged that police officers had told a group of skinheads planning to assault a groups of protesters burning the American flag "that unless they got completely out of control the police would neither interfere with their assaults nor arrest them." 985 F.2d at 97. Similarly, the court applied the exception in *Hemphill v. Schott*, 141 F.3d 412 (2d Cir.1998), in which the plaintiff, a robbery suspect who had been shot by his victim, alleged that police officers had "aided and abetted" the shooting by allowing the victim, a retired police officer, to accompany them in their pursuit of the plaintiff and by providing the victim with a handgun. *See id.* at 418-20. By contrast, in *Pitchell v. Callan*, 13 F.3d 545 (2d Cir.1994), the court held that the exception did not apply when an off-duty police officer did not stop another off-duty officer from shooting a houseguest. *See id.* at 549; *accord Clarke*, 312 F.Supp.2d at 290 (declining to apply the exception to failure to provide police protection to witnesses of murder because "there is nothing in the record indicating that [the police chief] or any of his subordinates encouraged the

[murderers] in any way or affirmatively permitted them to victimize [the witnesses]").

If Matican claimed only that the officers had failed to follow up on, and apprise him of, Delvalle's violent nature and release from jail, his claim would fall squarely on the "passive" side of the line. *See Pena*, 432 F.3d at 110 ("Under *DeShaney*, 'allegations that the defendant officers merely stood by and did nothing' are insufficient to state a constitutional violation." (quoting *Dwares*, 985 F.2d at 99)). Matican's claims are not so limited, however; he also claims that the officers executed the sting operation in such a way that Delvalle learned that Matican had set him up. Such conduct falls on the "affirmative" side of the line because, taking the facts in the light most favorable to Matican, it "assisted in creating or increasing the danger to the victim." *Dwares*, 985 F.2d at 99; *cf. Kallstrom v. City of Columbus*, 136 F.3d 1055, 1067 (6th Cir.1998) (applying state-created danger exception to city's release of undercover officers' personal information to counsel for drug conspirators).

c. "Shock the Conscience"

Although the officers' handling of the sting operation can be considered a state-created danger, it does not rise to the level of a substantive due-process violation because, even taking the facts in the light most favorable to Matican, their conduct does not "shock the conscience." There is no indication that the officers intentionally exposed Matican to Delvalle's assault. Moreover, although the officers had time to plan the

operation, it cannot be concluded that they were deliberately indifferent to Matican's safety in making those plans: They rejected as too risky a direct meeting between Matican and Delvalle. In addition, they arrived at a plan whereby Matican would be (and was) kept out of sight and, to further distance the sting from the drug buy, used Delvalle's illegal u-turn as a pretext for stopping him and searching his car. While Matican argues that the officers could have done more to insure his safety (most notably, using fewer cars during the sting and following up on Delvalle's bail status), their failure to do so evinces, at best, negligence, which, as noted, is "categorically beneath the threshold of constitutional due process." *Lewis*, 523 U.S. at 849, 118 S.Ct. 1708.

2. Qualified Immunity

As the officers did not violate Matican's substantive due-process rights, his § 1983 claim fails the first step of the inquiry under *Saucier*. Even assuming Matican could make out a constitutional violation, his claim would fail the second step because the officers would be entitled to qualified immunity.

Governmental actors are entitled to qualified immunity "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). "The relevant, dispositive inquiry in determining whether a right is clearly established is

whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202, 121 S.Ct. 2151.

For a constitutional right to be clearly established, there must be binding precedent recognizing it: "Only Supreme Court and Second Circuit precedent existing at the time of the alleged violation is relevant in deciding whether a right is clearly established." *Moore v. Vega*, 371 F.3d 110, 114 (2d Cir.2004). Furthermore, the "right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Id.; see also McDonald v. Haskins*, 966 F.2d 292, 293 (7th Cir.1992) ("It would create perverse incentives indeed if a qualified immunity defense could succeed against those types of claims that have not previously arisen because the behavior alleged is so egregious that no like case is on the books.").

The existence of the special relationship and state-created danger exceptions to *DeShaney* has been clearly established in the Second Circuit since *Ying Jing Gan* and *Dwares* were decided in 1993; however, that level of abstraction does not define the exceptions with

adequate specificity to defeat qualified immunity. *Cf. Saucier*, 533 U.S. at 201-02, 121 S.Ct. 2151 ("[T]here is no doubt that *Graham v. Connor*, [490 U.S. 386, 109 S.Ct. 1865 (1989)], clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness. Yet that is not enough."). The questions is rather whether, at the time of the sting operation in 2001, binding precedent would have reasonably apprised the officers that their conduct fell within one of the exceptions.

As noted, neither the Supreme Court nor the Second Circuit has held that CI status creates a "special relationship" sufficient to trigger a constitutional duty to protect the CI from private violence. Similarly, although the Court is of the opinion that the officers' alleged actions in this case constituted a "state-created danger," there is no binding precedent to put them on notice that using Matican in a sting operation triggered a constitutional duty to protect him from private violence after the operation was concluded. Finally, the Second Circuit cases holding that the requisite conscience-shocking standard had been satisfied have uniformly involved far more egregious behavior, *see Pena*, 432 F.3d at 115 (allowing and encouraging police officers to drink to excess on and off duty); *Hemphill*, 141 F.3d at 418-20 (facilitating robbery victim's ability to shoot robber); *Dwares*, 985 F.2d at 94 (agreeing not to interfere with skinheads' assault on protesters); nothing in those cases would suggest to a reasonable police officer that the officers' handling of the sting operation approached this

level of fault. Moreover, the officers' conduct is not the type that is obviously unlawful even in the absence of case law.

For these reasons, the officers' constitutional obligations to Matican were not, in the circumstances and at the appropriate level of specificity, "clearly established"; therefore, even if Matican had established a constitutional violation, the officers would be entitled to qualified immunity.

B. § 1983 Claim Against the City

Although "Congress did not intend municipalities to be held liable [under § 1983] unless action pursuant to official municipal policy of some nature caused a constitutional tort," *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury[,] the government as an entity is responsible under Section 1983." *Id.* at 694, 98 S.Ct. 2018. Matican argues that the City is liable under *Monell* because it failed to adequately train its police officers to protect CIs; however, Matican's failure to establish that the officers violated his constitutional rights is fatal to his *Monell* claim in two ways.

First, where a *Monell* claim is based solely on the actions of a municipality's officers, municipal liability cannot exist if the individual defendants have not

violated the plaintiff's constitutional rights. *See City of Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986) ("[N]either *Monell* . . . nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm."). The Court notes that the Second Circuit has cautioned that *Heller* does not apply where "the injuries complained of are not solely attributable to the actions of named individual defendants." *Barrett v. Orange County Human Rights Comm'n*, 194 F.3d 341, 350 (2d Cir.1999). In *Barrett*, for example, the court held that a county's human rights commission could be held liable for retaliatory discharge even if individual commissioners were found not liable because the commission itself had made the termination decision. *See id.* at 350. It is clear, however, that *Heller's* principal holding applies to failure-to-train claims because a municipality's failure to train its officers is only actionable if the failure results in constitutional violations by individual officers. *See Curley v. Village of Suffern*, 268 F.3d 65, 71 (2d Cir.2001) ("Following *Heller*, we have recognized that a municipality cannot be liable for inadequate training or supervision when the officers involved in making an arrest did not violate the plaintiff's constitutional rights."). Since the officers did not violate Matican's constitutional rights, *Heller* bars his failure-to-train claim against the City.

Second, to give rise to liability under *Monell*, a municipality's failure to train its officers must amount

to "deliberate indifference to the constitutional rights of [its] citizens." *Walker v. City of New York*, 974 F.2d 293, 297 (2d Cir.1998). In *Walker*, the Second Circuit set out three criteria for meeting this standard:

> First, the plaintiff must show that a policymaker knows to a moral certainty that her employees will confront a given situation .... Second, the plaintiff must show that the situation either presents the employee with a difficult choice of the sort that training or supervision will make less difficult or that there is a history of employees mishandling the situation. . . . Finally, the plaintiff must show that the wrong choice by the city employee will frequently cause the deprivation of a citizen's constitutional rights.

Id. at 297-98 (citations and internal quotation marks omitted).

Even assuming that Matican can satisfy the first two prongs of *Walker*, his failure to show that the officers violated his constitutional rights means he cannot satisfy the third; that is, he cannot demonstrate that lack of training caused the deprivation of his constitutional rights because no such deprivation occurred in the first place. Thus, Matican cannot establish that the City's alleged failure to train its officers constituted deliberate indifference to his constitutional rights.

Appendix B

C. State-Law Claim

The Court has jurisdiction over Matican's state-law negligence claim by virtue of 28 U.S.C. § 1367(a), which provides that "the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." Under 28 U.S.C. § 1367(c), however, a district court "may decline to exercise supplemental jurisdiction" if, among other circumstances, "the district court has dismissed all claims over which it has original jurisdiction." As the Court noted in *Drake v. Laboratory Corporation of America Holdings*, 323 F.Supp.2d 449 (E.D.N.Y.2004), the Second Circuit has set forth several factors to be considered when deciding whether to exercise supplemental jurisdiction: "(1) whether state law claims 'implicate [ ] the doctrine of preemption,' . . . (2) 'judicial economy, convenience, fairness, and comity,' . . . (3) the existence of 'novel or unresolved questions of state law,' . . . (4) whether state law claims 'concern the state's interest in the administration of its government.' " *Id.* at 452 (quoting *Valencia ex rel. Franco v. Lee*, 316 F.3d 299, 306 (2d Cir.2003)).

Where, as here, all federal claims have been eliminated before trial, concerns of judicial economy, convenience, fairness and comity usually "point toward declining to exercise jurisdiction over the remaining state-law claims." *Valencia*, 316 F.3d at 305. Moreover, although Matican's negligence claim does not appear

to raise any unsettled issues of state law, the issue of municipal tort liability is the type of "fundamental and complex question [ ] involving the balancing of important policies of state government" that should normally be left to state courts to adjudicate. *Id.* at 308. As there is no issue of federal preemption or other concern counterbalancing these factors, the Court declines to exercise supplemental jurisdiction over Matican's state-law claim.

CONCLUSION

With regard to Matican's § 1983 claims, the defendants' motion for summary judgment is granted and those claims are dismissed with prejudice. Matican's state-law claim is dismissed without prejudice.[4]

SO ORDERED.

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4. Dismissal of Matican's state-law claim creates no statute of limitations issue. Under 28 U.S.C. § 1367(d), "[t]he period of limitations for any claim [for which supplemental jurisdiction is invoked] . . . shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." *See also Jinks v. Richland County*, 538 U.S. 456, 461-65, 123 S.Ct. 1667, 155 L.Ed.2d 631 (upholding § 1367(d) as constitutional both facially and as applied to political subdivisions of states).

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR PANEL REHEARING DATED AND FILED JUNE 26, 2008

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Court House
40 Foley Square, New York, N.Y. 10007

Catherine O'Hagan Wolfe
CLERK OF COURT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 26th day of June two thousand and eight,

ORDER
No. 06-1983-cv

Robert Matican,

Plaintiff-Appellant,

v

City of New York, John Schneider, Julio C. Ordonez and Chris Zimmerman,

Defendants-Appellees.

Appendix C

Appellant Robert Matican having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: s/ Frank Perez
Frank Perez, Deputy Clerk